STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	)	
Application of Commonwealth Edison Company, for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406 of the Illinois Public Utilities Act, to construct, operate and maintain a new 138,000-volt electric transmission line in Kane and McHenry counties, Illinois.	)	Docket No. 07-0310

REPLY TO RESPONSES OF ICC STAFF AND COMED TO MOTION OF KREUTZER ROAD PARTIES TO TAKE ADMINISTRATIVE NOTICE INSTANTER

Frances Kreutzer, Marie Caranci, and William and Linda Byrne, (the "Kreutzer Road Parties" or "KRP"), by their attorney, pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission ("Commission") (83 Ill. Admin. Code 200.190), hereby reply to the responses of the Commission Staff ("Staff" and "Staff Response") and Commonwealth Edison Company ("ComEd") to the Motion of Kreutzer Road Parties To Take Administrative Notice Instanter ("KRP Motion"). In support of its Reply, the Kreutzer Road Parties state as follows.

The central informational item of which KRP moves that the Commission take administrative notice is a document representing an official governmental act, i.e., the resolution of the Kane County Historic Preservation Commission ("KCHPC") designating a portion of the so-called Kreutzer Farm an historic landmark ("Resolution"). A verified copy of the Resolution was provided as part of the KRP Motion. (Exhibit KRP Motion 1.4.) Staff challenges KRP's request that the Commission notice the Resolution on the procedural ground that it comes too late – that it should have been offered during the original hearing phase of the proceeding, or

that it should have been presented as part of additional hearings requested under Commission Practice Rule 200.870 (83 Ill. Admin. Code 200.870). ComEd has joined in the Staff's objections. Underlying the Staff Response, Staff's position is that, as a prerequisite to a tribunal's consideration of an official governmental resolution, an evidentiary record must be made; hence Staff's assertion that the only way the Commission may consider the Resolution is to reopen the record and conduct further evidentiary hearings. Staff's assertion is wrong.

Section 200.640 of the Commission's Rules of Practice, cited in the KRP Motion,[1] expressly authorizes the Commission to take administrative notice of certain categories of information, as well as "all other matters of which the circuit courts of this State may take judicial notice." (83 Ill. Admin. Code 200.640 (a)(7).) The specifically-named information categories that are subject to notice include governmental rules, regulations, administrative rulings and orders (83 Ill. Admin. Code 200.640 (a)(1)), and municipal and local ordinances (83 Ill. Admin. Code 200.640 (a)(4)). Clearly, the county-level[2] resolution referenced here falls within the purview of matters for which an administrative body such as the Commission may take official notice.

The Resolution did not exist, nor was it even pursued by its Kreutzer family applicants, until after the hearings in this matter had been held and the record marked "heard and taken." As Staff noted, this matter was marked "heard and taken" on January 29, 2008 (Staff Response, para. 1). Thereafter, following the historic landmark application, hearings, and deliberations, the KCHPC passed the Resolution on June 10, 2008. As Commission Practice Rule 200.640(c) governing administrative notice provides, notification of the materials noticed shall occur "either before or during the hearing **or otherwise**," and parties and staff "shall be provided a reasonable

[1] Staff mistakenly asserted that in its Motion KRP made no reference to Section 200.640. (Staff Response, Fn 1; *see* KRP Motion, p. 1, lines 2 – 4, and p. 5.)
[2] Kane County created the KCHPC by ordinance in 1982. (S*ee* KRP Motion, p. 3.)

opportunity to contest the material so noticed." (emphasis added) (83 Ill. Admin. Code 200.640(c).) Staff's position can only mean that it interprets this practice rule such that the exclusive avenue by which administrative notice may ever be taken of any matter is one whereby the subject material or information is presented as part of the notice proponent's evidentiary case, and presumably made subject to the rules for introduction of evidence and to cross-examination. Such an interpretation flies in the face of statutory/regulatory construction, legal precedent and logic; it would effectively nullify administrative notice as a tool for a tribunal to take cognizance of matters appropriately within its scope but not formally introduced into evidence.

First, Staff's position is inconsistent with applicable statutory and administrative provisions. Staff glosses over, if not ignores, the "or otherwise" portion of Rule 200.640(c). Said quoted phrase provides an alternative to notification "before or during the hearing," namely, after the hearings have concluded. To interpret the phrase otherwise (or to ignore it as Staff seems to advocate) would render it meaningless. Any other party may "contest the material so noticed" other than through an evidentiary hearing; indeed, Staff has done just that in the Staff Response, and presumably will further contest the material in its Reply Brief on Exceptions. (*See* Staff Response, p. 4, para. 10.) In addition, the Public Utilities Act provides that, in all contested cases before the Commission, the record is to include the documents and information set forth in Section 10-35 of the Illinois Administrative Procedure Act. (220 ILCS 5/10-103.) The referenced Section 10-35, in turn, lists the components of a record in a contested case, which separately include "all evidence received" and "a statement of matters officially noticed." (5 ILCS 100/10-35(a).) It is clear from this statutory provision that a matter subject to judicial or administrative

notice need not be entered into evidence, that such matter may be considered separately from the remaining evidentiary record.

Secondly, not only is judicial notice often taken of matters following the conclusion of evidentiary hearings, appellate courts frequently take judicial notice of facts presented initially on appeal. (*See generally* M. Graham, Handbook of Illinois Evidence Sec. 201.1 (8th ed. 2004); *Bobber Auto Truck Plaza v. Department of Revenue,* 143 Ill. App. 3d 614, 618, 493 N.E.2d 404 (5th Dist. 1986); *People v. Davis*, 65 Ill.2d 157, 357 N.E.2d 792 (1976).) The appellate court in *Bobber*, an administrative review case, took judicial notice of facts for the first time on appeal. (*See also County of Du Page v. Illinois Labor Relations Board*, 375 Ill.App.3d 765, 778, 874 N.E.2d 319 (2d Dist. 2007).)

Thirdly, it is logical, fair and reasonable for the Commission to take administrative notice as requested in the KRP Motion. The Resolution could not have been offered before or during the hearing phase of this proceeding, as it did not exist. The subject matter of the KRP Motion – the Resolution, with a supporting affidavit by a government official – is of a nature that is inherently reliable and verifiable, a governmental act that is a matter of public record. The Staff Response chides the Kreutzer Road Parties for not pursuing the historic landmark designation earlier and offering the Resolution and related information during the hearing. (Staff Response, p. 3, para. 7, 8.) Staff goes so far to accuse the Kreutzer Road Parties of "dilatory" conduct on one end of the behavioral spectrum to engaging in "litigation by surprise" on the other. Staff's accusatory statements are without any factual foundation, are based on mere supposition, are plainly inappropriate and should be stricken, or at least ignored. There is no evidence that the Kreutzer Road Parties purposely delayed seeking historic landmark designation from Kane County until after the hearings in this proceeding. Indeed, it is not evident that any members of

KRP even previously knew of the existence of the KCHPC or the ordinance establishing the County historic landmark designation program. It is not clear why KRP would want to have sought to purposefully delay the achievement of such designation in that, if they had achieved such designation earlier it could have influenced ComEd to propose a different route for the transmission line.

The Commission may and should take administrative notice of the Kane County proceedings and Resolution, as evidenced by Exhibit KRP Motion 1.4, and for which a local county official has supplied an affidavit verifying the same. It is within the Commission's legal authority to do so based on its Rules of Practice, applicable statutory and administrative provisions, relevant case law, and other legal authority, and would be fair and reasonable under the circumstances.

WHEREFORE, for the foregoing reasons, the Kreutzer Road Parties pray that the Commission grant their Motion Instanter,

Dated: August 22, 2008

Respectfully submitted,

The Kreutzer Road Parties

By:

WILLIAM M. SHAY, Attorney for the Kreutzer Road Parties

William M. Shay
Attorney at Law
456 Fulton Street
Suite 203
Peoria, IL 61602
(309) 636-7167
wmshay@wmshay.com

Frances Kreutzer
10320 Kreutzer Road
Huntley, IL 60142
847-669-5952

Marie Caranci
1504 W. Fremont Street
Arlington Heights, IL 50005
847-255-6386

William and Linda Byrne
1816 Lucylle Ct.
St. Charles, IL 60174
630-584-1458